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Supreme Court, U.S.
FILED

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No.

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1997

DAVID SIMEON and PETER ZEGLER,
Petitioners,

v.

JAMES E. HARDIN, JR., District Attorney
for the Fourteenth Judicial District,
Respondent.

On Petition for Writ of Certiorari
to the North Carolina Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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31 pp

Questions Presented:

1. Must a state court which exercises jurisdiction over a claim under federal civil rights statutes provide the full measure of relief which would be available in the federal courts, including an award of fees to a prevailing party?

2. Where individual litigant had sufficient stake in the outcome to give him standing to challenge state statute giving district attorney control of the criminal court calendar, did he also, by virtue of that stake in the outcome, obtain a benefit from the settlement limiting the prosecution's calendaring power, so as to make him a "prevailing party" for the purpose of an award of attorney's fees?

3. Whether a class representative's interest in obtaining relief for a class of persons similarly situated survives the mootness of the individual's claim, so as to render the individual plaintiff a "prevailing party" when relief is obtained for the class?

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Jurisdiction

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257. The decision of the North Carolina Court of Appeals affirming the superior court's denial of an award of attorneys' fees was filed July 15, 1997. Petitioners sought discretionary review by the North Carolina Supreme Court, which was denied by an order dated October 2, 1997. By operation of Rule 32 of the North Carolina Rules of Appellate Procedure, entry of judgment occurred on October 22, 1997.

Statement of the Case

North Carolina is unique among the states of the Union in granting, by statute, to the district attorney of its judicial districts, the power and authority to set the calendar for the criminal courts. Although the judges of those courts retain some residual authority to modify the calendar

established by the district attorney, generally all criminal proceedings from initial appearance through trial and sentencing are held on a schedule set by the prosecuting arm of the state. See *Simeon v. Hardin*, 339 N.C. 358, 451 S.E.2d 858 (1994), for the North Carolina Supreme Court's discussion of the practice and the merits of the claims in petitioners' underlying lawsuit.

Petitioners Simeon and Zegler filed a lawsuit in the Durham County Superior Court in November, 1992, alleging, on behalf of themselves and the class of criminal defendants facing prosecution in that county, both that the grant of calendaring power to the district attorney was unlawful on its face and that the district attorney used the calendaring power to obtain unfair advantages in the prosecution of crimes, thus rendering the power unlawful as applied. Petitioners' complaint cited the separation of powers, open courts, and law of the land provisions of the North Carolina Constitution and the due process clause of the Fourteenth Amendment of

the United States Constitution as grounds for their claims. The federal constitutional claims were raised pursuant to 42 U.S.C. Section 1983.

Petitioners alleged that the district attorney regularly and consistently abused the calendar power by holding pre-trial detainees in jail for extended periods, either for the purpose of coercing guilty pleas or, in cases of inadequate evidence, to ensure that the accused served some time as a detainee before charges were dismissed, by requiring defendants released on bond to show up numerous times in court, often with witnesses, and sometimes to wait all week in court without the case being called for trial, by placing many more cases on the calender than could be tried, without regard to whether the state was actually ready to try the cases, and then to select from among those, in no particular order, the cases to be tried, thus depriving defense counsel of any effective notice or opportunity to prepare for trial, and by using the calendar power to demonstrate to criminal

defendants the powerlessness of their attorneys to affect the court's schedule, thus undermining confidence in defense counsel.

In opposing summary judgment, petitioners supported their allegations with extensive detailed affidavits from criminal defendants, former district attorneys and assistant district attorneys, former judges, and defense attorneys. Petitioners also made a factual showing that calendar control by the district attorney was inefficient and contrary to standards adopted by various organizations of court professionals.

The Superior Court of Durham County granted summary judgment in favor of the district attorney, and dismissed all claims. The superior court held that it had no jurisdiction to entertain the claims, that the plaintiffs had no standing to raise the claims, that the matters raised were not justiciable in a civil action, but were only "raisable" in individual criminal cases, and that the court had no authority

to review the legislature's grant of power to the district attorney. Petitioners appealed from the dismissal and eventually obtained review in the North Carolina Supreme Court, which reversed and remanded.

Soon after the lawsuit was filed, the Durham County District Attorney had moved to modify his handling of the criminal charges against the two named plaintiffs, in an attempt to manufacture mootness. Simeon was offered a plea to a lessor charge, and a "prayer for judgment continued" on condition that he leave North Carolina and not return. Zegler had his charges dismissed.. Each proposal was a bargain too good to refuse, and petitioners accepted the state's offers. Plaintiffs' counsel scrambled to preserve standing by seeking to amend the complaint to add other plaintiffs and to intervene for other parties plaintiffs. In addition, plaintiffs asked the court to recognize the class action nature of the lawsuit. North Carolina civil procedure has no mechanism for "certification" of a class action. Rather, the class action

allegations of a complaint, like the other allegations, are presumed to be true until there is a court ruling on the matter, and a case filed as a class action is presumed to proceed as one unless and until the court rules otherwise. *Crowe v. Citicorp Acceptance Co.*, 319 N.C. 274, 354 S.E.2d 459 (1987). Despite filing motions and making specific requests for rulings, petitioners were unable to obtain rulings from the Superior Court on those procedural matters.

In a unanimous opinion, the North Carolina Supreme Court held that all requirements of standing and jurisdiction were met, and the claims could be raised by a civil action. Despite the changes in the status of their criminal charges, the court found that both petitioners had standing to raise the claims set out in the lawsuit. The court held that Simeon had standing because the charges against him were not fully resolved and the state could at any time "pray for judgment" in his suspended case. The court further held that although Zegler's individual claims were moot due to the charges being

dismissed, he could qualify as a class representative because the claims of the class members were "capable of repetition yet evading review." *Simeon v. Hardin*, 339 N.C. at 371, 451 S.E.2d at 867.

Reaching the substance of the asserted claims, the North Carolina Supreme Court held that the statute granting docket power to the district attorney was not unconstitutional on its face, but that the allegations regarding abuse of that power stated a claim regarding the statute "as applied." The matter was remanded to the Superior Court of Durham County for trial on the merits of the claims. *Simeon v. Hardin*, 339 N.C. 358, 451 S.E.2d 858 (1994).

On remand, after extended negotiations under the auspices of the senior resident judge, the dispute was resolved by a compromise agreement. The core provision of the agreement was the promulgation by the district attorney and the court of a "case management plan" by which the district attorney agreed to certain regular scheduling procedures and

to limitations on the exercise of the broad powers granted by the calendaring statute. Petitioners agreed to dismiss their lawsuit in exchange for promulgation of the plan. That agreement was reflected in a one page "Settlement Agreement" filed with the court.

After institution of the case management plan and dismissal of the lawsuit, petitioners filed an application for attorneys fees pursuant to 42 U.S.C. §1988. The decision of the North Carolina Supreme Court had rejected all claims based solely on state constitutional grounds, and held that the complaint stated a cognizable claim under the overlapping and similar "due process" provisions of state and federal constitutions, without distinguishing between the two sources. In their fee application petitioners asserted that they were prevailing parties because the bargained-for case management plan provided some of the relief they sought by limiting the absolute calendar power of the district attorney and preventing some of the previous abuses of that power. The

protracted and bitter litigation had consumed many lawyer hours. Petitioners sought an award of about $180,000.

Although the state did not challenge the records of attorney hours or the requested rate, it opposed the fee application on several legal grounds, asserting that there had been no compromise settlement of the lawsuit (merely a dismissal by plaintiffs), that petitioners were not prevailing parties, that the named plaintiffs had obtained no benefit from the resolution, that the various legal grounds stated separate and distinct claims and that petitioners had failed to keep separate time records for the claims, and that the application was a "blanket" fee request which should be rejected *in toto*. The Superior Court of Durham County agreed and denied any award of fees.

The North Carolina Court of Appeals affirmed that decision, restricting its rationale to a holding that the named plaintiffs were not prevailing parties. Although the Court of Appeals issued a printed opinion, which is reprinted in the

appendix, it authorized the publication only of a notation of its decision, found at 488 S.E.2d 854.

In affirming the denial of attorneys' fees, the Court of Appeals held that the two individual plaintiffs had obtained no benefit from the new case management plan which led to the settlement agreement, because they were no longer being prosecuted in the Durham County courts. The court held that in the absence of a ruling recognizing the class nature of the lawsuit, relief obtained for the class of criminal defendants did not establish prevailing party status. Denial of a fee award was based on the lack of any identifiable benefit which inured to the two individual plaintiffs as a result of the settlement agreement.

The North Carolina Supreme Court denied discretionary review of the Court of Appeals decision, by Order of October 2, 1997.

Throughout the fee proceedings, in their application to the superior court, in their brief to the court of appeals, and in

their petition for discretionary review by the supreme court, petitioners asserted a federal constitutional basis for their claims, namely, that a state court exercising jurisdiction of a claim under the federal civil rights statutes must provide the full relief that would be available to litigants if the claims had been brought in federal court, including an award of fees on the same grounds and in the same manner as they would be awarded in the federal courts. None of the courts addressed those assertions.

Reasons the Writ Should be Granted

Petitioners asserted in their state court lawsuit certain claims grounded in the North Carolina Constitution which are not cognizable in the federal courts. *See Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984) (state law injunctive relief not available in federal courts). They also contended that they were subjected to violations of due process of law under the Fourteenth Amendment of the

United States Constitution. Rather than split their claims, they included the federal claims in their state action, with the full expectation that the state courts would be required to provide relief commensurate with that available in the federal courts. Indeed, it is possible that their federal claims might be held barred if not raised in an action based on the same set of facts. Petitioners thus had compelling reasons for bringing their lawsuit in the state courts.

The federal and state courts have concurrent jurisdiction over claims brought under the federal civil rights statutes. *Howlett v. Rose*, 496 U.S. 356 (1990). State courts have an affirmative duty to exercise jurisdiction over federal actions, *Mondou v. New York, N.H. & H. Railroad*, 223 U.S. 1 (1912), and may not discriminate against federal actions in their exercise of jurisdiction, *Testa v. Katt*, 330 U.S. 386 (1947). The attorneys' fees provisions are an integral part of the civil rights statutes remedies, and state courts are authorized and required to award fees in appropriate cases.

Maine v. Thiboutot, 448 U.S. 1, at 11 n.12 (1980). The denial of a fee award in this action is contrary to the case law interpreting § 1988 and fails to provide full relief to petitioners. It undermines the effectiveness of state court enforcement of federal rights, and thus threatens the balance of comity which is essential to our federal system.

I. The Decision of the North Carolina Court of Appeals is Erroneous.

The rationale employed by the North Carolina Court of Appeals to justify the denial of a fee award is thin and unpersuasive. In spite of the previous ruling that Simeon and Zegler had standing, "a stake in the outcome," the court held that they did not obtain any benefit from the agreement placing written limitations on the power of the district attorney to set the calendar of criminal cases. The court of appeals appears to recognize that the class of criminal defendants (presumed to be viable pending any fact-finding to

the contrary) obtained a benefit from settlement of the lawsuit, but rejects the suggestion that any of that benefit inured to Simeon and Zegler individually.

The court of appeals' reliance on *Hewitt v. Helms*, 482 U.S. 755 (1987), is entirely misplaced. The plaintiff in *Hewitt v. Helms* had achieved only a hollow technical victory, a court ruling validating his cause of action. On remand, he obtained no relief at all. If the present case had been concluded at the time of the North Carolina Supreme Court decision, it would be similar to *Hewitt v. Helms*. Instead, on remand, plaintiffs used the favorable ruling and the threat of trial on the facts to negotiate a compromise agreement which gave them many of the things they sought in the lawsuit. The "case management plan" promulgated by the court and the district attorney provided for an orderly movement of cases through the court system, advance notice of cases which would be called for trial, a requirement that the state file written motions in order to seek continuance of a case, and

various other restrictions on the district attorney's docketing power. The relief obtained fully satisfied the requirements set forth in *Texas Teachers v. Garland School Dist.*, 489 U.S. 782 (1989) for conveying prevailing party status -- to the individual plaintiffs and to the class of persons similarly situated.

II. The failure of the state courts to provide full relief, including attorneys' fees awards, in federal civil rights cases, particularly cases against state agencies, creates two unequal forums for enforcement of federal rights and is contrary to the principles of federalism and comity.

Even though the law governing fee awards seems settled and clear-cut, various state courts have refused to follow it, either brazenly, *Stensvad v. Rowe*, 232 Mont. 378, 759 P.2d 138 (1988), or under the guise of some dubious distinction between the extant case law and the particular case under review, *Human Development of Erie, Inc. v. Zoning*

Hearing Board of Millcreek Township, 143 Pa. Commw. 675, 600 A.2d 658 (1991). The refusal of state courts to fully enforce the fee provisions creates a "watered down" version of federal civil rights in the state courts, and influences litigants to choose the federal courts as a preferred forum for more complete vindication of their rights. The principle of comity is most often invoked as a reason for federal courts to give due weight to state court decisions, but the very meaning of the term indicates its dual nature. State courts also have a duty to give due deference and authority to federal court rulings on federal issues, a duty also reflected in the supremacy clause of the Constitution.

The state courts' practice of "shortchanging" civil rights litigants on attorneys' fees may have survived and spread due to the difference in the mechanism for seeking review of such decisions. In the federal courts, the circuit courts of appeals review such decisions, by direct appeal, and are able to correct unjust or wrongly decided cases. When

the §1983 action has been brought in state court, a petition for writ of certiorari to the United States Supreme Court is the only method available for review of erroneous decisions of the state courts. It is unlikely to be an effective method of review, both because of the limited resources of the Court to grant certiorari review in such cases and also because of the limited applicability of any particular ruling. In any particular case only money is at issue, the underlying principle of law having been resolved in the case on the merits, and this Court cannot let its docket be crowded with matters concerning only the compensation of lawyers. These factors naturally influence the Court to deny its scare resource of certiorari review.

However, as the trend of the state courts to discount or deny fees in civil rights matters continues it has an effect on the choices lawyers make, both the choice of forum and the choice of whether to undertake such an action at all. If state courts are not required to fully enforce and vindicate federal

rights, the federal courts will become the exclusive forum for the presentation of those claims. The present case provides an opportunity for declaring that the state courts must provide the full measure of relief available in federal courts under § 1983, and for clarifying the "standing" as to benefit which justifies a fee award.

III. Even if the two named plaintiffs obtained no relief which affected them individually, the Court should hold that their success in obtaining relief for the class of persons similarly situated is adequate to make them prevailing parties.

In *United States Parole Commission v. Geraghty*, 445 U.S. 388 (1980), this Court recognized that a representative of a putative class retained standing to appeal unfavorable rulings regarding class certification, even following the extinction of the individual's case or controversy with the opposing party. The *Geraghty* decision identified certain procedural claims which survived the mootness of individual

claims due to the litigant's standing as a representative of the class to which he once belonged. The decision in *Geraghty* can be seen as a corollary of the recognition in *Gerstein v. Pugh*, 420 U.S. 103 (1975) that standing and class action status should be allowed for some transitory claims which are capable of repetition yet evading review. Because any individual litigant's stake in the outcome is likely to run its course before the case or controversy is resolved by the courts, yet other persons, unknown at the time of the inception of the litigation, will almost certainly find themselves in the same situation, the Court devised a rule of standing with particular application to such claims.

The claims of Simeon and Zegler fit into this category. It would be remarkable if their criminal charges had not been disposed of during the two and one half years from filing of the complaint to reaching the settlement agreement. For the North Carolina court to focus narrowly on any relief obtained by Simeon or Zegler personally was to ordain the result by the

analysis. The court should take this opportunity to clarify or extend the *Gerstein* and *Geraghty* line of cases by declaring that relief obtained which materially benefits a represented class is sufficient to satisfy the prevailing party test set forth in *Texas Teachers* and other cases.

The failure of the North Carolina courts to rule on petitioners' motion for class certification is no barrier to such a ruling. Petitioners stand in no worse position than the appellant in *Geraghty*, where the lower court's denial of class certification did not bar review. It is consistent with North Carolina case law that an action alleged to be a class action be treated as one until a court should rule to the contrary. The state court procedural holding is not an adequate and independent state ground for decision, as it is not consistently applied by the North Carolina courts. The state courts did not hold that treatment as a class action is inappropriate, they merely refused to rule. Petitioners fulfilled all procedural prerequisites for a ruling but were powerless to force the

court to rule on their motion. It would be arbitrary and irrational to have their claims foreclosed by matters beyond their ability to influence. *Logan v. Zimmerman Brush Company*, 455 U.S. 422 (1982). For all these reasons, the state court procedural ground should not prevent this Court from demanding full vindication of federal rights.

Conclusion

The petition for writ of certiorari should be granted.

Respectfully submitted, this ___ day of January, 1998.

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APPENDIX

No. COA96-873
North Carolina Court of Appeals
Filed : 15 July 1997

DAVID SIMEON, PETER ZEGLER,
and others similarly situated,

Plaintiff-Appellants

v. Durham County
No. 92 CVS 4318

JAMES E. HARDIN, JR., District Attorney
for the Fourteenth Judicial District,

Defendant-Appellee

Appeal by plaintiffs from order entered 26 April 1996 by Judge Orlando F. Hudson in Durham County Superior Court. Heard in the Court of Appeals 1 April 1997.

Marvin Sparrow; and N.C. Prisoner Legal Services, Inc., by Marcus Jimison, for plaintiff-appellants.

Attorney General Michael F. Easley, by Assistant Attorney General Debra C. Graves and Special Deputy Attorney General David Roy Blackwell, for defendant-appellee.

MARTIN, Mark D., Judge

Plaintiffs David Simeon (Simeon) and Peter Zegler (Zegler) (collectively plaintiffs) appeal from order of the trial court concluding plaintiffs were not entitled to attorney's fees pursuant to 42 U.S.C. § 1988.

On 2 October 1992 Simeon, on behalf of himself and others similarly situated, instituted the present action alleging N.C. Gen. Stat. §§ 7A-49.3, 7A-61, and 15A-931, which establish the district attorney's calendaring powers, were unconstitutional on their face and as applied. On 15 October 1992 the complaint was amended as of right to add Zegler "as a named representative of the plaintiff class." On 30 November 1992 District Attorney Ronald Stephens, the original named defendant, made a motion to dismiss plaintiffs' action for failure to state a claim.

Judge Robert L. Farmer, by order entered 11 March 1993, granted defendant's motion to dismiss. Plaintiffs appealed. By opinion filed 30 December 1994, the Supreme Court found the challenged statutes constitutional on their face, but remanded for further proceedings to determine "whether the statutes authorizing district attorney calendaring are being applied in an unconstitutional manner by the District Attorney of the Fourteenth Judicial District (Durham

prevailing parties; and (II) denying attorney's fees on the ground plaintiffs' counsel failed to differentiate between claims on time records.

At the outset, we note, although plaintiffs filed a motion for class certification, they failed to obtain a ruling upon the motion. Consequently, this issue is not properly preserved for appeal. N.C. R. App. P.10(b)(1). Plaintiffs also admit they in no way relied on the so-called "catalyst" theory to support their section 1988 claim. Thus, as this Court "will not decide questions that have not been presented to the courts below ...," *White v. Pate*, 308 N.C. 759, 765, 304 S.E.2d 199, 203 (1983), we need not consider the viability of the "catalyst" theory in this jurisdiction nor its applicability under the present facts and circumstances.

The dispositive issue in the instant case is whether, within the meaning of section 1988, plaintiffs are prevailing parties entitled to recoup the attorney's fees they incurred

prosecuting their claim for a violation of section 1983.

Section 1988 provide, "[i]n any action or proceeding to enforce a provision of [section 1983] ..., the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of costs." 42 U.S.C. § 1988 (b) (1994). Thus, to qualify for attorney's fees under section 1988, plaintiffs must be "prevailing parties." *Farrar v. Hobby,* 506 U.S. 103, 109, 121 L.Ed.2d 494, 502 (1992).

"A typical formulation is that 'plaintiffs may be considered "prevailing parties" for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing the suit.'" *Texas Teachers v. Garland School Dist.*, 489 U.S. 782, 789, 103 L.Ed.2d 866, 875 (1989) (*quoting Hensley v. Eckerhart*, 461 U.S. 424, 433, 76 L.Ed.2d 40, 50 (1983)) (citation omitted) (emphasis added). The "touchstone" of this formulation is the benefit achieved must result in a "material

alteration of the legal relationship of the parties ... ." *Id.* at 792-793, 103 L.Ed.2d at 878. "Beyond this absolute limitation, a technical victory may be so insignificant ... as to be insufficient to support prevailing party status." *Id.* at 792, 103 L.Ed.2d at 877. Simply put, even under the "generous formulation" adopted by the United States Supreme Court, *Farrar*, 506 U.S. at 109, 121 L.Ed.2d at 502, a purely technical or de minimis success on a legal claim does not vest plaintiffs with "prevailing party" status, *Texas Teachers*, 489 U.S. at 792, 103 L.Ed.2d at 877.

A.

We first consider whether Zegler is a "prevailing party" within the meaning of section 1988.

Our Supreme Court, in *Simeon I*, noted all the criminal charges against Zegler were dismissed thereby rendering his claims moot. *Simeon I*, 339 N.C. at 370, 451 S.E.2d at 867. In fact, the *Simeon I* court expressly stated

Zegler could remain a named plaintiff only if the action was certified as a class action. *Id.* At 371, 451 S.E.2d at 867. Plaintiffs failed to obtain class certification. Therefore, as Zegler was not a proper party to the present action, *id.*, he cannot be a "prevailing party."

B.

Although Simeon remains a viable plaintiff, *Simeon I*, 339 N.C. at 370, 451 S.E.2d at 867, we likewise conclude he is not a "prevailing party" because the new case management system does not materially alter the relationship between the parties. *See Texas Teachers*, 489 U.S. at 792, 103 L.Ed.2d at 878.

A consent decree, settlement, or other voluntary action by a defendant may justify the award of attorney's fees under section 1988. *See Maher v. Gagne*, 448 U.S. 122, 129, 65 L.Ed.2d 653, 661 (1980). The absence of a formal judgment, however, does not eviscerate the necessity for the

settlement to directly benefit plaintiff by altering its relationship with defendant. *See Texas Teachers*, 489 U.S. at 792, 103 L.Ed.2d at 877 (threshold requirement is some benefit to plaintiff).

In a strikingly similar factual setting the United States Supreme Court refused to award attorney's fees to plaintiff Aaron Helms because, among other things, "[t]he only 'relief' he received was the moral satisfaction of knowing that a federal court concluded that his rights had been violated." *Hewitt v.Helms*, 482 U.S. 755, 762, 96 L.Ed.2d 654, 662 (1987). In *Hewitt*, Helms was placed on administrative segregation for his possible involvement in a riot at the Pennsylvania State Correctional Institution. *Id.* at 757, 96 L.Ed.2d at 659. Over seven weeks later a prison hearing committee sentenced Helms to six months of disciplinary restrictive confinement. Id. While incarcerated, Helms filed a claim, pursuant to 42 U.S.C. § 1983, alleging the "lack of a prompt hearing ... [and use of] uncorroborated hearsay

testimony violated his right to due process." *Id.* Prior to any decision, Helms was paroled. *Id.* The Pennsylvania Bureau of Corrections subsequently amended its hearing procedures to address the use of confidential source information. *Id.* At 759, 96 L.Ed.2d at 660. Helms subsequently sought attorney's fees under section 1988. *Id.*

In declining to award Helms attorney's fees, the united States Supreme Court emphasized that Helms' release from prison prevented him from enjoying any benefit from the new prison hearing procedures and, thus, he could not be considered a "prevailing party." Id. At 763-764, 96 L.Ed.2d at 663. Likewise, in the present case, Simeon pled guilty to two counts of felonious assault prior to any decision in the instant action. On one count Simeon was sentenced to time served, and on the other he received a prayer for judgment continued (PJC). Although the Simeon I Court found Simeon's PJC status sufficient to convey standing, Simeon I, 339 N.C. at 370, 451 S.E.2d at 866-867, mere standing to sue

does not necessarily establish the new case management system benefitted Simeon and materially altered the parties' relationship. In addition, the mere possibility of re-incarceration is not sufficient to establish Simeon benefitted from Hardin implementing the new case management system. *See Hewitt*, 482 U.S. at 764, 96 L.Ed.2d at 663 (actual return to prison after parole not sufficient to retroactively render Helms a "prevailing party"). Therefore, Simeon is not a "prevailing party."

It naturally follows – as plaintiffs cannot satisfy the threshold requirement for the award of attorney's fees pursuant to section 1988, see Farrar, 506 U.S. at 109, 121 L.Ed.2d at 502 (only "prevailing party" qualifies for fees under section 1988) – we need not consider their remaining assignments of error.

Accordingly, the trial court did not err by denying plaintiffs' motion for attorney's fees under section 1988.

Affirmed.

Judges EAGLES and WALKER concur.

Report per Rule 30 (e).